IN THE

Supreme Court of the United States

October Term, 1974

No. 75-1157

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. [illegible]EZZI, Secretary of State of the State of New York, ARTHUR LEVIT[illegible] mptroller of the State of New York, LAVERNE S. GRAF, Clerk o[illegible] the County Legislature, County of Niagara, New York and KENNE[illegible] COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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for
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR,
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and
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Lockport, New York,
Attorneys for Appellants.

February, 1976.

BATAVIA TIMES, APPELLATE COURT PRINTERS
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Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on January 9, 1975 by a three-judge District Court for the Western District of New York as reinstated and modified by that

Court's judgment of December 15, 1975. The December judgment amended the January judgment by making its terms applicable to a charter for Niagara County purportedly adopted in 1974 rather than to a charter purportedly adopted in 1972, the proposed 1972 charter having been the subject matter of this action and having been declared to be the law of Niagara County by the January judgment. In addition, the December judgment declared the case not to be moot, and enjoined the intervening defendants-appellants from prosecuting a pending action in the New York State Supreme Court challenging the validity of the purported 1974 charter.

The District Court's judgment of January 9, 1975, which the December 15, 1975 judgment reinstates and modifies, is the subject of an appeal to this Court docketed on May 5, 1975, as Case No. 74-1390.

On October 6, 1975, this Court issued the following order and judgment with respect to Case No. 74-1390:

> "This Cause having been submitted on the statement of jurisdiction, motion to affirm and suggestion of mootness,
>
> "On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974."

The District Court directed all counsel to appear on October 8, 1975. Limited argument was had at that time with respect to: (1) the issue of the mootness of the case, (2) a motion by the plaintiffs-appellees for permission to amend their complaint in order to have a hearing and proceedings with respect to the proposed 1974 charter, and (3) the course of action to be taken by the District Court with respect to the entire matter.

On October 23, 1975, the District Court entered its decision and order, which, among other things, amended the January judgment ". . . so that the 1974 charter, which supersedes the 1972 charter, is in full force and effect as the instrument defining the form of local government for Niagara County."

The Opinion Below

The opinion of the District Court for the Western District of New York dated October 23, 1975 appears as Appendix 1, *infra*, pages 1a-7a.

Jurisdiction

The jurisdiction of this Court to review the judgment of January 9, 1975 and the judgment of December 15, 1975 is conferred by 28 USC, Section 1253.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Jurisdictional Statement in Case No. 74-1390,* filed with the Court on May 5, 1975, which, with leave of the Court, is incorporated in its entirety as part of this Jurisdictional Statement.

The judgment of January 9, 1975 (Appendix B, Original Jurisdictional Statement) held that Article IX, Section

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* The Jurisdictional Statement filed by the intervening defendant-appellants in Case No. 74-1390 will be referred to as the "Original Jurisdictional Statement."

1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York violate the guarantee of equal suffrage under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Questions Presented

The essential questions presented on this appeal are the questions propounded in the Original Jurisdictional Statement (pages 5 and 6). In view of the District Court's judgment of December 1975, the following additional questions are raised:

A. Has this case become moot as a consequence of the destruction of the subject matter of the action, that is, the proposed 1972 charter, by the intervening purported adoption and implementation of a superseding charter in 1974?

B. Did the District Court exceed its jurisdiction in ordering in December 1975 that its January judgment be amended to declare the 1974 charter to be in full force and effect rather than the 1972 charter, particularly in view of the facts that:

i. The case as filed, presented and decided dealt wholly and solely with the proposed validity and controlling effect of the 1972 charter;

ii. The District Court *itself* in the first instance refused to have its judgment of January 9, 1975 apply to validate and to require the implementation of the 1974 charter on the apparent grounds that the 1974 charter and the facts and circumstances relating to its purported adoption were not part of the case before the District Court, and the District Court therefore had no jurisdiction with respect to the 1974 charter; and

iii. No proceedings or hearings relating to the 1974 charter have been had or permitted.

C. Does 28 USC, Section 2283, afford the District Court authority to enjoin the prosecution of a pre-existing action in the courts of the State of New York relating to the validity of the proposed 1974 charter, specifically since that action alleges procedural and other deficiencies as to the attempted implementation of that charter?

Statement of Case

This action was commenced to obtain a judgment declaring that a proposed charter for Niagara County put to referendum in 1972 was validly adopted and thus the governing law of the County of Niagara, despite the fact that it did not obtain the votes required by the New York State Constitution and by the Municipal Home Rule Law of the State of New York for adoption.

All pleadings, arguments and briefs in the case were directed to the question of the implementation of the 1972 charter.

The District Court rendered its decision on November 24, 1972, granting the relief sought and ordering the State and County officials to implement the 1972 charter as the governing law of Niagara County.

In the interim, however, and prior to the handing down of this decision, a new and different charter was put to referendum in 1974. This charter also failed to obtain the votes required by the New York State Constitution and the Municipal Home Rule Law. Prior to the entry of judgment on the basis of the November 24, 1972 decision, a request was made to have that judgment apply to validate and to implement the 1974 charter rather than the

1972 charter which was the subject of the action. That request was denied by the District Court on the ground that since there had been no consideration of the charter put to referendum in 1974, or the circumstances of that referendum, and since the case which the Court had before it dealt wholly and solely with the charter put to referendum in 1972, the Court did not have jurisdiction to make its judgment apply to the charter put to referendum in 1974. Based on this refusal, the judgment entered by the District Court on January 9, 1975 specifically declared that the charter purportedly adopted in 1972 was the governing law of the County of Niagara and specifically directed the State and County officials to implement that charter.

After the intervening defendants perfected an appeal to this Court from the January 9, 1975 judgment (Docket No. 74-1390), it was discovered that, with the concurrence of the initial petitioners in the action, the State and County governmental respondents were not implementing the 1972 charter, but in fact were proceeding to attempt to implement and to enforce as the governing law of the County the 1974 charter.

As a consequence of this intervening conduct on the part of the initial parties to the proceeding, the intervening defendants made an application to the District Court to vacate the judgment of January 1975 on the ground that the initial parties to the proceeding had destroyed the subject matter of the action and had effectively made the case moot. Significantly, the Niagara County appellees, who had themselves instituted an unsuccessful action in the District Court to have the 1972 charter declared valid,[1] represented to the District Court as well as to this Court

[1] Original Jurisdictional Statement, Appendix D, pp. 24a-28a.

that the case had indeed become moot. The District Court at that point refused to grant the application to vacate the judgment on the ground that the reasons underlying the application were not "within the purview of Federal Rules of Civil Procedure Rule 60." Thereafter, this Court requested the parties to file briefs on the issue of mootness, and that was done.

On October 6, 1975, this Court entered an order and judgment vacating the District Court January 1975 judgment and remanding the cause to the District Court ". . . for reconsideration in light of the provisions of the new charter adopted by Niagara County in 1974."

No hearings were had in connection with the remand to the District Court. Instead, counsel for the parties were summoned for oral consideration of the matter. In recognition of the Court's lack of jurisdiction to effect a *nunc pro tunc* revision of the January 1975 judgment to apply to the proposed 1974 charter, the original petitioners in the action filed a motion to amend their complaint to raise the issue of the validity of the 1974 charter and to have the Court hold hearings with respect to the circumstances surrounding the November 1974 referendum and the proposed validation of the purported 1974 charter. The District Court denied that motion for amendment of the complaint, ruled that the case had not become moot, and amended its January 1975 judgment in order to make that judgment applicable to the 1974 charter. This appeal followed.

I. This Case has Become Moot; the Judgments of January 19, 1975 and December 15, 1975 should be Reversed and Vacated.

Arguments concerning the mootness of this case have been presented to this Court in briefs filed in Case No. 74-1390. The intervening appellants respectfully refer the Court to those points.

II. The District Court Exceeded its Jurisdiction in Entering the December 1975 Declaratory Judgment that the 1974 Niagara County Charter is in Full Force and Effect as the Form of Local Government for Niagara County.

A. The District Court is without authority to render judgment on a matter not placed in issue by the pleadings and not a subject of the action.

It is fundamental that a court cannot act *sua sponte,* but must await the action of some person invoking its jurisdiction. In declaring the 1974 charter to be the instrument defining local government in Niagara County, the District Court was, in effect, invoking its own jurisdiction. The validity of the 1974 charter was not placed in issue by the pleadings in this case. There were no hearings or proceedings with respect to the 1974 charter. Indeed, the District Court itself specifically refused to have its original January 1975 judgment apply to the 1974 charter for the very reason that that charter was not before the Court, not part of the case, and therefore beyond the jurisdiction of the Court. Nor was the 1974 charter's validity "tried by express or implied consent of the parties" within the meaning of Section 15(b) of the Federal Rules of Civil Procedure. In fact, the District Court denied petitioners' motion to amend the complaint in the action in order to

give the Court jurisdiction and to have hearings with respect to that charter. Nevertheless, the Court below presumed to enter a judgment declaring that charter to be the law of the County of Niagara.

In attempting to justify this unusual judgment, the District Court stated that:

> "The 1974 charter is already part of the record in this case and the United States Supreme Court has specifically directed us to consider it."

We have the following observations as to this proffered justification:

1. The record in this case, with respect to the issues presented by the petition, became complete upon entry of the District Court's judgment determining those issues on January 19, 1975. The purported 1974 charter was not part of that record.

2. The District Court itself initially refused to consider the 1974 charter on the very ground that it was *not* a part of the case and therefore beyond its judisdiction.

3. The appeal of the intervening defendants to this Court was from the January 1975 judgment, which related wholly and solely to the 1972 charter.

4. The sole relevance of the 1974 charter to this case and to the appeal is with respect to whether the purported adoption and the actual implementation of that charter rendered this case moot.

5. At various times during proceedings relating to the District Court's January 1975 judgment, all parties to the action conceded that the District Court did *not* have jurisdiction over the 1974 charter and could not render any judgment with respect to it.

6. The direction of this Court to the District Court on October 6, 1975 was to *reconsider the case before it* in light of a subsequent legislative development as that legislative development might make the case before the Court moot. It was not a direction to the Court to consider the *validity* of the subsequent legislative development, or to enter a declaratory judgment concerning the enforceability or governing effect of that legislative development.

The District Court exceeded its jurisdiction in attempting to render a judgment declaratory of the validity or enforceability of the 1974 charter.

B. The District Court's declaratory judgment constitutes an impermissible interference with pending state court proceedings.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court considered the propriety of federal court injunctions restraining pending state criminal prosecutions. The Court held that federal injunctions against pending state criminal actions can be issued only under *extraordinary circumstances* where the danger of irreparable harm is both *great* and *immediate*. In *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion case to *Younger v. Harris, (supra)* the Court held that:

> "The same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." (401 U.S. 66, at 73)

Although this Court did not equate declaratory judgments and injunctions in all cases, it limited the situations in

which a declaratory judgment would be permissible where an injunction would not to the following:

> "There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief." (401 U.S. 66, at 73)

The basic rationale underlying *Samuels* was a concern that *Younger* would be effectively emasculated by the use of federal declaratory judgments which would have effects identical to those injunctions. As the Court noted:

> "The practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (401 U.S. 66, at 73)

In the case at hand, both a declaratory judgment and an injunction have been issued by the District Court. The District Court has erroneously decided matters currently pending before a state tribunal. Its judgment not only violates the statutory prohibition against federal court interference with state court matters (28 USC, Section 2283), but the judicial prohibition against such interference set forth in *Younger* and its progeny.

On June 27, 1975, the Town of Lockport commenced an Article 78 proceeding challenging the attempt by the Secretary of State of the State of New York to certify, implement and enforce the 1974 charter. This proceeding was pending at the appellate level when the District Court sought—again on its own motion and without application of any party—to declare the 1974 charter to be the governing law of the County.

In *Steffel v. Thompson,* 415 U.S. 452 (1974), the Supreme Court held that *Younger's* requirement of exceptional circumstances to justify federal declaratory relief against state criminal prosecution was inapplicable when a prosecution was not *pending.* In June of this past year, the Court amplified its holding as to the necessity of a "pending" proceeding in *Hicks v. Miranda,* 45 L.Ed.2d 223 (1975), where a state court proceeding which was begun on the day *following* the completion of service of the complaint in a federal court proceeding seeking declaratory relief was held to be a pending proceeding within the meaning of *Steffel v. Thompson, (supra).* The Court noted that:

> "We now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but *before any proceedings of substance on the merits have taken place in the federal court,* the principles of *Younger v. Harris* should apply in full force. Here, appellees were charged on January 15, prior to answering the federal case and *prior to any proceedings whatsoever before the three-judge court.* Unless we are to trivialize the principles of *Younger v. Harris,* the federal complaint should have been dismissed on the State's motion absent satisfactory proof of those extraordinary circumstances calling into play one of the limited exceptions to the rule of of *Younger v. Harris* and related cases." (Emphasis added, 45 L.Ed. 2d 223, at 239)

Lockport's Article 78 state court proceeding was commenced on June 27, 1975. It was not until October 6, 1975 that this Court directed the District Court to consider the question of mootness in light of the 1974 charter. In presumed response to that direction, the District Court entered its declaratory judgment validating the 1974 charter. By that time, the state court proceeding attacking the validity of the 1974 charter had been pending for six (6) months, and the state court of first instance had already rendered a

decision and judgment, from which an appeal was pending. The 1974 charter was never the subject of "any proceedings of substance on the merits" in the federal courts. Thus, the District Court has improperly interfered with a pending state court proceeding.

The *Younger* doctrine should be applied in the instant case. In *Huffman v. Pursue,* 43 L. Ed.2d 482 (1975), this Court held that *Younger* applied to an Ohio civil proceeding, stating:

> "The component of *Younger* which rests upon the threat to our federal system is . . . applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."

The Court carefully limited the scope of its decision to the particular civil statute at hand, and, thus, left open the much broader question of the applicability of *Younger* to state civil proceedings in general. However, the Court took cognizance of the Federal Circuit Court decisions in which *Younger* has been held to be applicable to state civil proceedings and noted that:

> "The seriousness of federal judicial interference with state civil functions has long been by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

At issue in the New York Article 78 proceeding is the acknowledged and exclusive right of a state to determine what subordinate governmental instrumentalities it will create to assist in carrying out vital state governmental functions, what structures those instrumentalities will have, and what procedures will be required prior to the implementation of any plan to create such instrumentalities.

These issues, central to the very authority of state government in the State of New York, have been foreclosed from consideration by its courts by the decision of the District Court.

If this Court is not prepared to extend the prerequisites to federal interference with state criminal proceedings set forth in *Younger* to *all* civil cases, we submit that those prerequisites should apply to those cases which involve questions of state governmental administration. A showing of either "extraordinary circumstances" or "great and immediate" harm should be as necessary in this class of cases as it is in criminal prosecutions. Surely, cases such as these are as vital to state interest as are criminal prosecutions and nuisance abatement proceedings.

Additionally, the District Court has wholly failed to abide by the generally applicable "standards of restraint" which the notions of comity and federalism (as well as those of equity jurisprudence) demand.

III. The District Court's Injunction Prohibiting the Town of Lockport from Proceeding with the Pending State Court Action was Improper.

The arguments advanced above with respect to the District Court's declaratory judgment apply with equal force to the injunction portion of its judgment.

28 US Code, Section 2283, provides:

> "A court in the United States may not grant an injunction to state proceedings in a State Court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The mandate of Section 2283 applies with equal force to an injunction directed at the parties as it does to an injunction directed at the state court itself, *Dresser Industries, Inc. v. Insurance Co. of North America*, 358 F.Supp. 327 (N.D. Texas, 1973), aff'd. without opinion for 75 F.2d 1402.

The District Court attempted to justify its injunction as having been rendered "in order to protect the judgment of this court". However, the 1974 *per curiam* opinion of the Supreme Court in *Poe v. Gerstein*, 94 S.Ct. 2247 (1974), stands for the proposition that an injunction of state court proceedings to protect the judgment of a federal court is unjustified in the absence of an allegation that the state court would not respect federal court's judgment:

> "The District Court properly refused to issue the injunction; for there was 'no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision . . . holding the challenged ordinance unconstitutional, *Douglas v. Jeannette*, 319 U.S. 157, 165, 87 L.Ed. 1324, 63 S.Ct. 877 (1943).'"

Here, there has been no allegation that the state court would not respect the federal court's decision. Indeed, the lower state court in the pending Article 78 proceeding felt itself bound to accept the decision of the District Court as to constitutionality with respect to the 1972 charter. In the absence of any indication that the courts of New York State will not respect the federal court's decision, this injunction is improper.

As stated in *Atlantic Coast Line Railroad Co. v. Brotherhood of Engineers*, 398 U.S. 281, 297 (1970):

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an

orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

Moreover, Lockport's state proceeding raises issues other than the constitutional issues which were at issue in the District Court. Lockport's petition alleges that there were numerous procedural defects in connection with the filing of the 1974 charter which mandates its revocation and recission (see paragraphs 16, 17, 18 and 19 of the petition). If the injunction is allowed to stand, the Town of Lockport will be forever foreclosed from obtaining a determination of those issues. Certainly it cannot be reasonably argued that foreclosure of these procedural issues is necessary to effectuate the judgment of the District Court.

IV. The District Court's January 19, 1975 and December 15, 1975 Judgments should be Reversed and Vacated.

Respectfully submitted,

VICTOR T. FUZAK, ESQ.,
Attorney for Appellants,
Town of Lockport and Floyd Snyder.

February 1976.

APPENDIX 1

Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LaVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants-Appellees,

and

THE TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants-Appellants.

Civ-1973-222

Appearances:

Moot, Sprague, Marcy, Landy, Fernbach & Smythe (John J. Phelan, Esq., of Counsel), Buffalo, New York, for Plaintiffs-Appellees.

Appendix 1—Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Michael G. Wolfgang, Esq., of Counsel), Buffalo, New York, for Defendants-Appellees Ghezzi and Levitt.

Samuel L. Tavano, Esq., Niagara County Attorney, Lockport, New York, for Defendants-Appellees Graf and Comerford.

Hodgson, Russ, Andrews, Woods & Goodyear (Victor T. Fuzak, Esq., of Counsel), Buffalo, New York, for Intervening Defendants-Appellants.

CURTIN, Chief Judge:

On October 6, 1975 the United States Supreme Court entered the following order in the above entitled case:

> The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provisions of the new chapter [sic] adopted by Niagara County in 1974.

In view of this direction, and with the consent of the other judges on the panel, I scheduled oral argument on October 8, 1975 and all parties were present. The parties stipulated that the 1974 Charter and also the proceedings in the New York State courts in which the Town of Lockport sought to invalidate the 1974 Charter be marked as exhibits in this case. In that action, Justice Joseph P. Kuszynski, on July 31, 1975, issued a decision in which he cited the action taken by this panel as controlling in his holding that Article IX, Section (1)(h)(1) of the Constitution of the State of New York and Section 33(7) of the

Appendix 1—Decision of the United States District Court for the Western District of New York, Entered on October 23, 1975

New York State Municipal Home Rule Law are unconstitutional. The Citizens for Community Action were not named as parties in the state court action. The following is a brief summary of the various arguments made and positions taken by the parties at oral argument.

First of all, the plaintiffs filed a motion to amend the complaint. It is the purpose of the amended complaint to make the 1974 Charter part of the proceedings in this case. Procedurally, plaintiffs' theory is that the election in November proceed as planned; that the Town of Lockport be permitted to litigate the amended complaint before the three-judge court; and that for the present the court hold ruling on the remand until the court has heard full arguments from the Town. It is plaintiffs' opinion that the case is not moot, that it should be further litigated in federal court, and that there should be no abstention.

The New York State defendants agree that the case is not moot and that there should be a final determination by the Supreme Court. It is the intention of the Secretary of State to permit the 1974 Niagara County Charter to go into effect. When questioned about statewide application, it was first stated that if the question arose in other counties, the State would not follow our decision but would follow state law requiring a double majority. However, it was also stated that since Justice Kuszynski in state court has now held the same section unconstitutional following our decision, for the present the State would not apply the section to other elections in the state. Apparently, the State does not plan to appeal Justice Kuszynski's

decision. It is the State's position that the court should not be concerned with the provisions of the Charter, but only with the manner in which the referendum was conducted. As to the proposed amended complaint, the State questioned whether the court would be following the Supreme Court's order if it allowed the complaint to be amended.

The Niagara County defendants did not object to the amended complaint as long as the November election was allowed to proceed. In their opinion, the case is not moot and should be litigated in federal court.

Finally, the intervenor-defendant, Town of Lockport, informed the court that the Town intended to appeal Justice Kuszynski's decision, but nevertheless wants this court to hold that the question is moot. The Town admitted that there are no substantial differences between the 1972 and 1974 Charters, but argued that there was a difference in circumstances, perhaps a difference in political climate, at the time the Charters were voted upon. The other parties are of the view that the differences between the 1972 and 1974 Charters are minimal. The Town argues that this lawsuit is moot because the 1974 Charter is now certified, thus making the validity of the 1972 Charter no longer an issue warranting resolution by this court.

After considering all of the above arguments, the court finds that this lawsuit is not moot. First of all, as admitted by the Town of Lockport and as is evident from a perusal of the 1972 and 1974 Charters, there is no substantial difference between the two Charters. The only differ-

ences are merely technical ones relating to the functions and duties of the various officers and branches of the proposed county government. The Town of Lockport's argument that there was a difference in political climate when the voters approved each Charter is simply irrelevant to a determination of whether the sections are constitutional. In this regard, it should be noted that each Charter was approved by a majority of the voters of Niagara County, with a majority of city voters but a minority in the rural areas.

In an effort to counter the mootness argument raised by the Town of Lockport, plaintiffs have moved this court to grant the amendment of the complaint to include the 1974 Charter. However, this course of action is not necessary since the 1974 Charter is already part of the record in this case, and the United States Supreme Court has specifically directed us to consider it. The motion of the plaintiffs to amend the complaint is therefore denied.

The court rejects the Town of Lockport's mootness argument because the problem presented in this case is one which is capable of repetition yet evading review. *Moore v. Ogilvie,* 394 U.S. 814 (1969). If this court were to rule that the case is moot, there is a reasonable expectation that the wrong complained of by plaintiffs would be repeated, a consideration warranting against a holding of mootness. *United States v. W. T. Grant & Co.,* 345 U.S. 629, 633 (1953). Furthermore, the certification of the 1974 Charter has done nothing to diminish the definite and concrete nature of the controversy between the parties, and

this controversy continues to touch upon the legal relations of the parties to this lawsuit who have adverse legal interests. Under *Aetna Life Ins. Co. v. Hawarth*, 300 U.S. 227, 240-241 (1937), this consideration warrants a finding that there still exists an actual case or controversy necessary for this court to retain jurisdiction and render a final determination. *U. S. Const. Art. III.*

For these reasons, the judgment of this court rendered on January 9, 1975 holding Article IX(1)(h)(1) of the New York State Constitution and § 33(7) of the Municipal Home Rule Law of the State of New York unconstitutional is hereby reinstated and in full force and effect. In addition, the January 9, 1975 judgment is hereby amended so that the 1974 Charter, which supersedes the 1972 Charter, is in full force and effect as the instrument defining the form of local government for Niagara County. It is further ordered that, pursuant to 28 U.S.C. § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the state court action.

I have conferred with the other members of the panel and they have given me authority to enter the present order and to sign for them. This order shall become effective upon filing, and the parties may proceed further in accordance with the Rules of Federal Practice.

So ordered.

/s/ WILLIAM H. TIMBERS JTC
WILLIAM H. TIMBERS
United States Circuit Judge

/s/ HAROLD P. BURKE JTC
HAROLD P. BURKE
United States District Judge

/s/ JOHN T. CURTIN
JOHN T. CURTIN
United States District Judge

Dated: October 23, 1975.

APPENDIX 2

Judgment Entered December 15, 1975

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

vs.

MARIO M. CUOMO, as Successor to JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LA VERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants-Appellees,

and

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants-Appellants.

Civ-1973-222
Sup. Ct. Doc.
No. 74-1390

This cause having come on to be heard, on the 8th day of October, 1975 before the Honorable John T. Curtin, U.S. D.J., one of the members of a statutory three-judge district court, convened in this cause pursuant to 28 USC §§ 2281 and 2284 consisting of the Honorable William H.

Timbers, Judge of the United States Court of Appeals for the Second Circuit and the Honorable Harold P. Burke and the Honorable John T. Curtin, Judges of the United States District Court for the Western District of New York, after a judgment of the identical Court granted the 9th day of January, 1975 was vacated by the Supreme Court of the United States in an order entered on the 6th day of October 1975 as follows:

> The judgment is vacated and the case is remanded to the United States District Court for the Western District of New York for reconsideration in light of the provision of the new chapter (sic) adopted by Niagara County in 1974.

Now upon the order of the Supreme Court of the United States entered the 6th day of October 1975 and upon the documents filed in the Supreme Court of the United States including the briefs of all parties and a motion having been made by the plaintiffs-appellees to amend the complaint in the action to set forth a cause of action for declaratory and injunctive relief pertaining to the 1974 Niagara County Charter and upon the transcript of the oral argument of the attorneys for all parties to the action heard by the Honorable John T. Curtin, U.S.D.J., one of the members of the Special Statutory District Court on the 8th day of October 1975 at the United States Court House in Buffalo, New York at which time the plaintiffs-appellees were represented by John J. Phelan, of counsel for the firm of Moot, Sprague, Marcy, Landy, Fernbach and Smythe of Buffalo, New York and the defendants-appellees Mario M. Cuomo, Secretary of State of the State of New York and Arthur Levitt, Comptroller of the State of New York were represented by Louis J. Lefkowitz, Attorney-

General of the State of New York, Michael G. Wolfgang and Douglas J. Cream, assistant Attorneys-General, of counsel and La Verne S. Graf, Clerk of the County Legislature, County of Niagara, New York and Kenneth Comerford, County Clerk, County of Niagara, New York were represented by Samuel L. Tavano, County Attorney, County of Niagara and the intervening defendants-appellants were represented by Victor T. Fuzak of the firm of Hodgson, Russ, Andrews, Woods, and Goodyear of Buffalo, New York and the court having considered the issues remanded and an opinion having been signed and filed on the 23rd day of October 1975 written by the Honorable John T. Curtin, U.S.D.J., in which the Honorable William H. Timbers, U.S.D.J., and the Honorable Harold P. Burke, U.S.D.J. concurred and due deliberation having been had, it is therefore

ORDERED, ADJUDGED AND DECREED that this cause is not moot and it is further

ORDERED, ADJUDGED AND DECREED that the judgment rendered by this Court on the 9th day of January, 1975 be and it is hereby reinstated and it is further

ORDERED, ADJUDGED AND DECREED that the judgment of this Court, as reinstated, be and it is hereby amended at the foot as follows:

> ADJUDGED AND DECREED that the 1974 County Charter, Local Law No. 2 of Niagara County for 1974, which supersedes the 1972 County Charter, Local Law No. 1 of Niagara County for 1972, is in full force and effect as the instrument defining the form of local government for Niagara County.

and it is further

ORDERED that pursuant to 28 USC § 2283, in order to protect the judgment of this court, the Town of Lockport and its agents are enjoined from proceeding further in the action in the Supreme Court of the State of New York entitled, "In the Matter of Town of Lockport, New York and one vs. Mario M. Cuomo, Secretary of State of the State of New York *et al.* for judgment under CPLR Article 78", and it is further

ORDERED that the motion of the plaintiffs-appellees to grant an amendment to the plaintiffs' complaint to include the 1974 Charter be and it is hereby denied.

s/ WILLIAM H. TIMBERS, *USCJ*
WILLIAM H. TIMBERS
United States Circuit Judge

s/ HAROLD P. BURKE, *USDJ*
HAROLD P. BURKE
United States District Judge

s/ JOHN T. CURTIN, *USDJ*
JOHN T. CURTIN
United States District Judge

Dated: December 10, 1975.

APPENDIX 3

Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,

Defendants,

and

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,

Intervening Defendants.

Civil Action
No. 1973-222

Notice is hereby given that The Town of Lockport, New York, and Floyd Snyder, individually and as Supervisor of The Town of Lockport, the Intervening Defendants above named, hereby appeal to the Supreme Court of the United States from each and every part of the judgment

entered in this action on December 15, 1975 in the United States District Court for the Western District of New York reinstating, modifying and amending the judgment of said District Court entered on January 9, 1975 which declared Article IX, Section 1(h)(1), of the Constitution of the State of New York and Section 33(7) of the Municipal Home Rule Law of the State of New York [Volume 35c McKinney's Consolidated Laws of New York, Section 33 (7)] unconstitutional as being in violation of the guarantee of equal suffrage contained in the equal protection clause of the Fourteenth Amendment to the United States Constitution; declaring a proposed Charter for Niagara County to be duly adopted; enjoining and directing the above-named Defendants to file and implement the Niagara County Charter set forth in Local Law No. 2 of 1974 for Niagara County; holding the action to be not moot; and enjoining the Intervening Defendants from proceeding with an action pending in the Supreme Court of the State of New York to restrain the implementation of proposed Local Law No. 2 of 1974. An appeal to this Court from the judgment entered on January 9, 1975 is pending under Docket No. 74-1390.

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

This appeal is taken pursuant to 28 U.S.C.A., Section 1253.

Dated: Buffalo, New York, December 18, 1975.

s/ VICTOR T. FUZAK
VICTOR T. FUZAK, ESQ., for

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Office and Post Office Address
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: (716) 856-4000

and

ANDREWS, PUSATERI, BRANDT, SHOEMAKER, HIGGINS & ROBERSON

Attorneys for Intervening Defendants

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., *et al.*,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 9330 Tonawanda Creek Road, Clarence Center, New York.

That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on John J. Phelan, Esq., attorney(s) for Plaintiffs in this action at 2300 Erie County Savings Bank

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

Building, Buffalo, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

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WESTERN DISTRICT OF NEW YORK

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Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

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That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on Michael G. Wolfgang, Esq., attorney(s) for State of New York Defendants in this action at 65

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

Court Street, Buffalo, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., *et al.*,
Plaintiffs,

vs.

JOHN J. GHEZZI, Secretary of State of the State of New York, *et al.*,
Defendants,

and

THE TOWN OF LOCKPORT, NEW YORK, *et al.*,
Intervening Defendants.

Civil Action No. 1973-222.

State of New York, }
County of Erie. } ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 9330 Tonawanda Creek Road, Clarence Center, New York.

That on the 18th day of December, 1975 deponent served the annexed Notice of Appeal to the Supreme Court of the United States on Miles A. Lance, Esq., attorney(s) for Niagara County Defendants in this action at Niagara

Appendix 3—Notice of Appeal to the Supreme Court of the United States Filed December 18, 1975

County Attorney's Office, Lockport, New York the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

SUSAN K. WATERS
The name signed must be printed beneath
SUSAN K. WATERS

Sworn to before me
this 18th day of December, 1975.
Linda L. Zienciowski
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977